

THE HONOURABLE SRI JUSTICE

A.GOPAL REDDY

W.P.No.6433 of 1994

Dt. 20-02-2006

Between:

1.Tungabhadra Machinery & Tools Ltd. and another.

..Petitioners.

and

1.Union of India, rep.by its Secretary, Ministry of commerce,
New Delhi and others.

..Respondents.

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Oral Order:

This writ petition is filed questioning the action of the respondents 1 &2 in not paying the Export Incentives as per the promise made by them under Cash Compensatory Support (CCS), Replenishment License (REP) and also benefit accrued due to devaluation of rupee.

The 1st petitioner—Company is engaged in the design, manufacture, erection and commissioning of machinery and equipment for the pulp and paper industry both in India and abroad which also claims to be the first company to export turn-key paper project abroad. The scope of the work includes design, manufacture, supervision of erection and commissioning of the plant. The Government of Guyana entered into an agreement with the Government of India to import paper-recycling plant, polypack manufacturing plant and bicycle production plants from India. Pursuant to the said agreement, the Government of India through State Bank of India (SBI) extended a line of credit of 100 million rupees to the Government of Guyana as per the terms agreed between them. The SBI pursuant to the direction of the Government of India entered into an agreement with Bank of Guyana in the year 1989. An arrangement is also made between the two banking authorities of both the Governments for finance trade transactions under the credit agreement for a credit of Indian rupees 100 millions by the Government of India to the Government of Guyana. Accordingly the Government of India nominated M/s.Projects & Equipment Corporation of India Limited—3rd respondent herein as its agent to enter into the agreement for supply of the paper plant with the Government of Guyana or any of its nominated parties. Accordingly the 3rd respondent has to supply/get supplied on turn key basis to the Government of Guyana or its nominee a paper plant of 25 Tonnes Per Day (TPD) capacity at a cost of Rs.66 million. The 3rd respondent called bids for supply of 25 TPD paper plant and called 1st petitioner and other companies for discussions and 1st petitioner's bid was accepted for supply of TPD paper recycling plant to be supplied to Guyana on turn key basis by the respondent No.3, and the 1st petitioner in the contract entered into with the foreign buyer was nominated as "Manufacturing Associate" vide contract No.PEC/SAPIL/PAPER/GUY/90 dated 23-05-1990. Subsequently the 3rd respondent also entered into an Associateship Agreement with the 1st petitioner on 23-05-1990. As per the said agreement export incentive will be passed on to the petitioner by issuing Disclaimer Certificate under the rules and regulations of Government of India in force from time to time and enable the petitioner to claim and collect that benefit directly from appropriate authorities and shall be shared with the 3rd respondent on prorata basis. Further, 1st petitioner shall have the agreement including the foreign contract registered with the appropriate authorities in India so that it can claim such benefits. It was agreed that the export

benefits given by the Government of India as in force on the date of agreement or subsequent benefits, which the Government of India may give would be available to petitioner No.1, and 3rd respondent would not claim and would give Disclaimer Certificate to that effect in favour of 1st petitioner. One of the benefits, which were available on the date of entering into agreement, is Cash Compensatory Support as per circular message of Ministry of Commerce, Department of Commerce dated 31-03-1989. Through the said circular the existing rates of Cash Compensatory Support on export of engineering goods which will expire on 31-03-1989 will continue to operate as per Annexure-I to the exports on or after 01-04-1989 and upto 31-03-1992.

While so, by Circular dated 03-07-1991 the Government of India suspended the Cash Compensatory Support (CCS) with effect from 03-07-1991 in view of restructuring and expansion of the Replenishment Licence Scheme. Through the said circular all instructions issued in respect of grant of CCS both for physical and deemed exports entered on or 3rd July, 1991 stands cancelled and clarified that all exports effected upto and including 2nd July, 1991 would remain eligible for their respective rates of CCS. On issuance of such circular 1st petitioner through its letter dated 07-03-1992 represented to the Ministry of State for Commerce, Government of India for restoration of CCS but the said request was rejected stating that it is not possible to accede the same. On petitioner making further representation dated 18-03-1993 for grant of relief, the Ministry through its letter dated 31-03-1993 informed that *exports effected after 02-07-1991 do not attract CCS benefit*. In view of rejection of the same petitioners moved this Court by way of present writ petition contending that the 1st petitioner legitimately expected that CCS would be given to it as they entered into an agreement with the 3rd respondent prior to 2nd July, 1991 and all of a sudden withdrawing the same is arbitrary, illegal and they are estopped from withdrawing the incentives given earlier. Alternatively, it was also pleaded that the policy decision taken by the respondents 1 and 2 can only apply to those exports, which have been entered into after such date but will not have effect to the existing contracts and the benefits which were announced earlier will be for a period of contract entered with the 3rd respondent and, therefore, they are entitled to the benefit.

Counter affidavit has been filed on behalf of respondents 1 and 2 stating that export incentives which were allowed is a matter of policy in public interest through executive instructions with clear stipulation that the respondents reserve the right to withdraw/amend them as and when felt necessary and justified in public interest and accordingly acting bona fide the respondents suspended the CCS with effect from 03-07-1991 in public interest. The 3rd respondent was never authorised on behalf of respondents 1 and 2 for entering into a contract with the petitioner and any agreement made between the 3rd respondent and the petitioner will not bind on them. The representations made by the petitioner No.1 have been rejected in view of withdrawal of CCS with effect from 03-07-1991. There was no assurance at any time by the respondents 1 and 2 that CCS is a permanent scheme. On the contrary, it was made clear that it is subject to withdrawal at any time being discretionary and granted as an incentive to exporters, therefore, affording an opportunity of being heard does not arise. Petitioner No.1 cannot claim any legitimate expectation, which is not an independently enforceable right. It is further stated that Liberalised Exchange Regulation Management and Exim Schemes (LERMS) benefits were given to export earnings and market rate was applied to a certain portion of the export earnings and the official rate for the balance. This has no application in the case on hand, as the contract was determined in Indian rupee and payment made accordingly. In fact, when the Government of India gets repayment in Indian rupees at a later date it stands to lose in dollars in view of the exchange rate devaluation. By denominating the contract in rupees, the Government of India has assumed the exchange risk and will in fact get less dollars. In view of the same, petitioner No.1 cannot ask for benefit under convertibility as the contract was in rupees and accordingly rejected the representations.

The 3rd respondent filed a counter denying Government of India nominating it as its agent to enter into agreement for supply of paper plant with the Government of Guyana or any of its nominated parties and it was never authorised to act on behalf of the President for the purpose of entering into contracts in terms of Article 299 of Constitution of India. The 3rd respondent is associated with the 1st petitioner vide Memorandum of Understanding dated 27-01-1989 for paper recycling plant. The

Cash Compensatory Support (CCS) prevailing at the time of execution of Associateship Agreement was 10% of the foreign exchange earned i.e. after deducting the import content, if any. Accordingly clause-20 was incorporated for export incentives as the benefits were available at the relevant point of time and such clause will not bind respondents 1 and 2. It has been admitted that consequent to withdrawal of CCS, 3rd respondent, 1st petitioner and other exporters suffered financial loss.

Sri K.Ramakrishna Reddy, learned Senior Counsel appearing for the petitioners submits that taking into consideration all incentives available to the exporters the 1st petitioner submits its bid and accordingly entered into an agreement with the 3rd respondent. By withdrawing the said benefit before completion of the contract 1st petitioner suffered a great financial loss by honouring the commitments to the foreign buyer and 3rd respondent. The 1st petitioner legitimately expecting that CCS benefits given to the 3rd respondent will be passed to it as per the existing policy till the end of contract i.e. 31-03-1992. The respondents 1 and 2 have not explained the superceding circumstances justifying in withdrawing CCS and accordingly the same is liable to be set aside, restoring the said benefit till the contract period is over. In the absence of public interest involved withdrawal of the same is highly arbitrary and petitioner is entitled to opt the benefits till the contract period, which was initially made applicable. In support of his submission he placed strong reliance on the judgment of the Apex Court in ***DAI-CHI KARKARIA LTD. v. UNION OF INDIA***.

Refuting the above submissions, Mr. N.V.Raghava Reddy, learned Additional Standing Counsel for Central Government appearing for respondents 1 and 2 submits that though an Associateship Agreement was entered between the 1st petitioner and the 3rd respondent, it will not bind respondents 1 and 2 unless the President authorises the 3rd respondent to enter into agreement as per Article 299 of the Constitution of India. The doctrine of *Promissory Estoppel*, which was pressed into service, is not applicable to the facts of the present case and the Government of India took a policy decision to withdraw the benefits, which were given earlier. When the policy itself is very clear that the benefits, which are given, can be withdrawn at

any time and the same was withdrawn keeping in view the public interest, which cannot be questioned in a court of law. In the absence of any assurance that CCS is a permanent, 1st petitioner cannot claim any benefit under the said scheme. For such proposition he placed reliance on the Division Bench judgment of this Court in ***THOTA VENKATESHWARA PRASAD v. GOVERNMENT OF A.P.***

The Government of India through its Circular dated 31-03-1989 considering the rates of Cash Compensatory Support applicable as on 31-03-1989 decided to revise the rate of CCS engineering goods as per Annexure-I and the same will be made applicable to exports made on or after 01-04-1989 upto 31-03-1992 and further clarified the intention is to keep the rates stable for the above period reserving right of the Government to withdraw/alter at any time as merited. In view of restructuring and expansion of the Replenishment Licence Scheme which will be separately announced and keeping in view the present level of foreign exchange rates the Government of India decided to suspend the Scheme of Cash Compensatory Support with effect from 03-07-1991 clearly clarifying that all exports effected upto and including 2nd July, 1991 would remain eligible for their respective rates of CCS. It is not brought to the notice whether any restructuring and expansion of the Replenishment License Scheme has been separately announced pursuant to the said circular or not. The reasons for suspension of the same in the counter can be broadly stated as, having regard to the financial position of the country the CCS was withdrawn with effect from 03-07-1991. Further, it was stated that there was no scope to permit the 1st petitioner for the existing policy. LREMS benefits were given to export earnings and market rate was applied to a certain portion of the earnings and the official rate for the balance and the same will have no application in the case of contract which was determined in Indian rupees and payment made accordingly.

In the case of ***DAI-CHI KARKARIA LTD.*** (1 supra) the Supreme Court was dealing with a notification issued by the Government of India to encourage manufacture of goods indigenously for effecting supplies to essential Indian enterprises as a part of the scheme which was project-based and the exemption under the said notification was a part of project-based exemption scheme. On withdrawal of benefits contained in exemption notification writ petitions are filed which were dismissed by the High

Court of Bombay. On appeal the Supreme Court held that in respect of exemptions that have been made by the Government the doctrine of *promissory estoppel* will not be applicable if the change in the stand of the Government is made on account of public policy. Once the public interest is accepted as the superior equity which can override individual equity as held by the Supreme Court in ***SHRJEE SALES CORPN. V. UNION OF INDIA*** ((1997) 3 SCC 398). It was further noticed therein that the Government can resile from a promise even if there is no manifest public interest involved provided, of course, that no one is put in any adverse situation which cannot be rectified. After reiterating the law position in para-6 on facts it was held that the public interest disclosed is as stated in the counter affidavit and the circumstances cannot stand close scrutiny and failed to discharge any burden and the factors taken into consideration by the Government for withdrawing are wholly irrelevant and do not subserve public interest and accordingly quashed the amended notification.

Recently the Supreme Court in ***BANNARI AMMAN SUGARS LTD. v. CTO*** held as under:

“In order to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and bald expressions without any supporting material to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the doctrine. The courts are bound to consider all aspects including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the courts have to do equity and the fundamental principles of equity must for ever be present in the mind of the court.”

The Supreme Court further held in para-22 as under:

“....We find no substance in the plea that before a policy decision is taken to amend or alter the promise indicated in any particular notification, the beneficiary was to be granted an opportunity of hearing. Such a plea is clearly unsustainable. While taking policy decision, the Government is not required to hear the persons who have been granted the benefit which is sought to be withdrawn.”

In the present case except a bald statement that the 1st petitioner has submitted a bid to the 3rd respondent and entered into Associateship Agreement for supply of plants and equipments, technical documentation and services for the supervision of erection and start up of a paper plant nothing was mentioned. Once it is denied that the 3rd respondent was never authorized on behalf of respondents 1 and 2 for entering into contract with the petitioner nor there was any assurance given to the 3rd respondent for its undertaking for supply of paper plant on certain incentives to the Government of Guyana, the 3rd respondent himself cannot enforce promissory estoppel and legitimate expectation with respondents 1 and 2 when it is specifically stated in the counter that LERMS benefits were given to export earnings and official rate for the balance. It is categorically stated that the contract was determined in Indian rupees and payment made accordingly and the Government of India gets repayment in Indian rupees at a later stage it stands to lose in dollars in view of exchange rate devaluation. The 3rd respondent itself cannot ask for the benefit and for convertability, since contract was in rupees. In view of the same, petitioner's entering into a contract and performed its obligation and entitled to benefits under the circular and the same cannot be withdrawn cannot be accepted. If at all there is an agreement and the 3rd respondent acted upon, it is only the 3rd respondent can claim benefit and pass on the same to the petitioner.

In the counter affidavit in para-21 it is categorically asserted by respondents 1 and 2 and also 3rd respondent that LERMS benefits were given to export earnings and market rate was applied to certain portion of the export earnings and official rate for the balance and the same has no application in the case of the petitioner as the contract was determined in Indian rupees and payment made accordingly. When the Government of India gets repayment in Indian rupees at a later date it stands to lose in dollars in view of exchange rate devaluation. By denominating the contract in rupees, the Government of India has assumed the exchange risk and will in fact get less dollars. Withdrawal of CCS benefit was necessitated having regard to the foreign exchange position of the country and it was made in the public interest.

In view of the same, the submission made by the learned counsel for the petitioners that the respondents are estopped from withdrawing the notification and the 1st petitioner—Company legitimately expected to continue the CCS benefit till 31-03-1992 cannot be accepted.

The writ petition is accordingly dismissed. No costs.

_____ A.GOPAL REDDY, J.

20-02-2006

Murthy